Customs Bulletin

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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 146

(T.D. 89–4)

INTERPRETATION OF EXPORTATION FOR PURPOSE OF FOREIGN-TRADE ZONES ACT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule.

SUMMARY: This document gives notice of Customs final determination that imported merchandise cannot be considered to be exported pursuant to the Foreign-Trade Zones Act when it is sent to a foreign-trade zone in the United States for manufacturing. Accordingly, two Customs rulings, C.S.D. 84–97, republished as C.S.D. 85–10, as well as ORR letter ruling 218551, which permitted this expressly to obtain the payment of duty drawback or to cancel a temporary importation bond, are revoked as being without support in the law.

EFFECTIVE DATE: February 27, 1989.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Entry Rulings Branch (202–566–5856).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Foreign-trade zones (zones) are secured areas within the United States to which certain foreign and domestic merchandise may be brought for some purposes without being subject to the Customs laws of the United States. Their purpose is to attract and promote international trade and commerce. The Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a–u) ("the FTZA") provides for the establishment and regulation of foreign-trade zones in the U.S. Section 3 of the Act (19 U.S.C. 81c), allows foreign and domestic merchandise to be brought into a zone without being subject to the Customs laws of the U.S. The fourth proviso to that section expressly provides that for the purpose of the drawback laws, the warehous-

ing laws and the laws on temporary importations under bond, merchandise may be considered exported, when admitted into a zone for the sole purpose of exportation, destruction or storage. Part 146, Customs Regulations (19 CFR Part 146), governs the admission of merchandise into a zone; the manipulation, manufacture, destruction, or exhibition of merchandise in a zone; the exportation of merchandise from a zone; and the transfer of merchandise from a zone into the customs territory.

Schedule 8, Part 5, Subpart C. Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), provides for temporary importations under bond (TIB's). Under these provisions, merchandise to be repaired, altered or processed in the U.S., may be admitted into the U.S. under bond without the payment of duty, provided the merchandise is exported within one year from the date of importation. If merchandise entered under a TIB is not exported before the expiration of the bond period, liquidated damages in the amount of the bond may be assessed against the importer.

Section 313, Tariff Act of 1930, as amended (19 U.S.C. 1313), provides for the refund of customs duty on certain imported merchandise. This refund is known as "drawback," and is generally dependent on exportation of the imported merchandise or an article manufactured from the imported merchandise.

Section 101.1(k), Customs Regulations (19 CFR 101.1(k)), defines "exportation" as a severance of goods from the mass of things belonging to this country with the intention of uniting them with the mass of things belonging to some foreign country.

On June 22, 1984, Customs issued ORR ruling letter 216727, which held that merchandise that is imported under a temporary importation bond (TIB), processed in the customs territory of the U.S. as defined in General Headnote 2, TSUS, and § 101.1(e), Customs Regulations (19 CFR 101.1(e)), and then transferred into a U.S. zone for manufacturing is "considered" exported. Accordingly, merchandise manufactured in a zone may be entered from the zone for consumption upon payment of proper duty. It is implicit in this ruling that because shipment of merchandise to a zone for the purpose of manufacture is considered an exportation, a TIB covering such merchandise could be cancelled or a claim for drawback perfected upon the transfer of the merchandise.

The ruling was published as C.S.D. 84–97 on June 24, 1984 (18 Cust. Bull. 1069), and republished on February 13, 1985 (19 Cust. Bull. 509), as C.S.D. 85–10. ORR letter ruling 218551 dated January 29, 1986, also followed the reasoning of C.S.D. 84–97/C.S.D. 85–10, for purposes of duty drawback.

In response to a petition from three domestic trade associations, comprised of U.S. steel and automotive parts manufacturers, which requested the revocation of these rulings as being contrary to law and prejudicial to their members' competitive posture, Customs decided that comments should first be solicited before making a final

determination in this matter. Consequently, on March 4, 1988, Customs published a notice to this effect in the Federal Register (53 FR 6996), and by subsequent notice on May 11, 1988 (53 FR 16730), the comment period was extended until June 17, 1988.

Discussion of Comments

In all, 98 comments from the public were received in response to the notice, 90 of which advocate the retention of the rulings, seven advocating their revocation. Substantial Congressional interest was also generated on both sides of this issue. One comment, which is beyond the scope of the notice, recommends that the term "exportation" in the Customs Regulations be expanded for drawback purposes to include imported duty-paid merchandise sent to the Virgin Islands.

Comments Favoring Retention

Virtually all those commenting in favor of retention state that the rulings promote the underlying policy of the Foreign-Trade Zones Act, as amended, 19 U.S.C. 81a–u (FTZA), to encourage domestic manufacturing and employment, and that revocation of the rulings could have the opposite effect. In particular, motor vehicle manufacturers located in special-purpose zones, or subzones, contend that they could be forced to transfer to foreign plants certain operations now performed on their behalf in this country by companies not using zones. The consequence of revocation according to this view would, if anything, be the importation directly to zones of more elaborate components already finished.

Although a number of commenters insist that no legal issue is involved, only one of "policy," various legal arguments in support of the rulings are advanced by several commenters. It is initially asserted that the rulings find justification, as they themselves set forth, in the plain general language of section 3 of the FTZA, as amended, 19 U.S.C. 81c(a), which allows foreign and domestic merchandise of every description, except that prohibited by law, to be brought to a zone and manufactured; merchandise entered under a temporary importation bond (TIB) for initial processing, could thus lawfully be sent to a zone for manufacturing, and would thereby be considered exported, as required to satisfy the statutory bond requirement; and duty-paid merchandise would similarly be considered exported as necessary for drawback purposes if placed in a zone subject to the third proviso to section 3, which requires that domestic, including duty-paid, merchandise be treated as foreign, if its identity in the zone is lost.

These commenters also perceive the rulings as founded upon a concept of actual exportation, albeit as modified by Customs, which has been done from time to time assertedly to accommodate changing technology and business conditions. For example, merchandise sent to the Trust Territory of the Pacific Islands, T.D. 56545(3), and

merchandise assembled into a communications satellite sent into permanent orbit in outer space, T.D. 68–206(1), have been stated to be exported for drawback purposes, notwithstanding that neither destination constitutes a foreign country, and section 101.1(k), Customs Regulations (19 CFR 101.1(k)), in line with long settled judicial precedent, dictates, in part, that to be exported there be an intent to unite the goods with the commerce of "some foreign country."

In any event, these commenters distinguish the fourth proviso to section 3 of the FTZA, which expressly allows merchandise to be regarded as exported, by declaring that this proviso is limited to its specific purposes (exportation, storage or destruction), and that it is not concerned with merchandise intended for manufacture in a zone.

In addition, the following arguments are made: inasmuch as the FTZA was amended in October 1984, subsequent to C.S.D 84–97 (85–10), and again in October 1986, subsequent to ORR Ruling 218551, without adverse impact on either ruling, Congress has impliedly acquiesced in and accepted them; it has not been demonstrated that the rulings are "clearly wrong" as required by section 177.10(b), Customs Regulations (19 CFR 177.10(b)); the March 4, 1988, notice of reconsideration (53 FR 6996) does not give the public a fair opportunity to understand the issues and comment meaningfully—it should be withdrawn and a new notice published.

Comments Favoring Revocation

Those commenting in favor of revocation state that the rulings are without foundation in the FTZA, that, indeed, the only authority for considering merchandise exported under the Act is contained in the fourth proviso to section 3 thereof, which limits the merchandise so sent to exportation, storage or destruction, and prohibits its manufacture. Some of these commenters also observe that the rulings in effect confer de facto zone status upon domestic (nonzone) businesses which supply zones users, without an application for zone status having been approved by the Foreign-Trade Zones (FTZ) Board at the Department of Commerce, as required by law.

Also, the three trade associations comprised of steel and automotive parts manufacturers, which originally petitioned for revocation, contend that the rulings facilitate the importation and domestic consumption of foreign steel and automotive parts at lower rates of duty than would otherwise be possible, at variance with the Congressional intent underlying both the TIB provisions and the drawback statute, and adversely affecting their members' competitive posture.

Customs Analysis

After a thorough review of the Foreign-Trade Zones Act, its plain meaning as well as legislative history, Customs is constrained to agree that the fourth proviso to section 3 of the Act, as amended, 19

U.S.C. 81c(a), contains the exclusive authority thereunder for considering merchandise sent to a zone as exported, as required either for cancelling a temporary importation bond (TIB) (Schedule 8, Part 5, Subpart C, item 864.05, TSUS; 19 U.S.C. 1202), or for obtaining the payment of duty drawback under 19 U.S.C. 1313. The rulings under reconsideration are therefore without support in the law, and they will be revoked.

"CONSIDERED" EXPORTED

Section 3 of the FTZA was amended in 1950 by Public Law 81–566 to authorize manufacturing in a zone, and to add a fourth proviso whereby merchandise sent to a zone could be considered to be exported in part "for the purpose of— * * * the drawback, warehousing, and bonding * * * provisions of the Tariff Act of 1930 * * *".

To obtain the benefits of the fourth proviso, however, requires compliance with its restrictions. Merchandise may not be entered from the zone for domestic consumption absent a finding of public interest by the FTZ Board, and then only upon payment of a duty equal to that from which the proviso relieved the merchandise. S. Rept. 81–1107, *reprinted in,* 1950 U.S. Code Cong. & Admin. News 2533, 2537–2538. In addition, merchandise subject to the proviso is confined solely to being exported, destroyed or stored in the zone. On its plain face, the proviso precludes manufacturing, and this is so even if merchandise subject thereto were destined for actual exportation. "The benefits would not extend to articles taken into a zone for manipulation or manufacture prior to exportation." *Ibid.,* 2537.

Nevertheless, the rulings interpret the FTZA as generally allowing merchandise to also be considered exported for item 864.05 TIB or drawback purposes, if sent to a zone *for* manufacturing, following which the products could be entered for consumption upon payment of "applicable" duty, which could be considerably less than the duty from which the rulings relieved the merchandise.

It is Customs' view that the rulings are inconsistent with the prohibition against manufacturing, and to this extent the other restrictions inherent as well, in the fourth proviso. As such, the rulings result in the effective partial repeal of the proviso, which runs contrary to "the elementary canon of construction * * * that a statute * * * be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979); and *cf., United States* v. *United Continental Tuna Corp.,* 425 U.S. 164, 169 (1976).

Consequently, except for the fourth proviso, TIB merchandise, because it must either be exported or destroyed (19 U.S.C. 1557(c)), would be "prohibited by law" from admission to a zone. See C.S.D. 81–71.

Duty-paid merchandise, though, may ordinarily be admitted to a zone. If it loses its identity therein, the third proviso prescribes that

it be treated as foreign. But this does not permit such merchandise to be treated as exported. On the contrary, foreign merchandise in a zone is imported, and, other than under the fourth proviso, is correctly considered as such, a fact routinely recognized by Congress in the legislative history of the statute, and by Customs in its regulations and rulings. See, *e.g.*, S. Rept. 905, 73d Cong., 2d Sess., 2 ("[A foreign-trade zone] aims to foster the dealing in foreign goods *that are imported* * * *" (emphasis added)); 19 CFR 146.1(b)(11); C.S.D. 83–21; ORR Ruling 76–0067. Moreover, a party may not "choose" foreign status for such merchandise pursuant to the third proviso, as ORR Ruling 218551 improperly allows. See C.S.D. 82–112.

ACTUALLY EXPORTED

The rulings in question, C.S.D. 84–97 (85–10), and ORR Ruling 218551, are not properly founded, in that there is no authority in the FTZA for "considering" merchandise exported if sent to a zone for manufacturing; they do not rely upon any notion of actual exportation as defined in the Customs Regulations, section 101.1(k), whether modified or otherwise. Even if the rulings did depend upon a concept of actual exportation, their attempted justification on this basis would be equally without merit. It would be fundamentally incompatible with the Congressional and administrative recognition, *supra*, that foreign merchandise placed in a zone is actually imported, not exported, these naturally being mutually exclusive propositions.

CONGRESSIONAL ACQUIESCENCE

The amendments to the FTZA in October 1984 (19 U.S.C. 81c(b), as amended; 19 U.S.C. 81o(e), as amended; Pub. L. 98–573) and in October 1986 (19 U.S.C. 81c(c), as amended; Pub. L. 99–514), and accompanying legislative history (*reprinted in* 1984 U.S. Code Cong. & Admin. News 4910; 1986 U.S. Code Cong. & Admin. News 4075), did not to any extent reference or discuss the subject matter currently under review. In the face of a silent Congressional record, as here exists, administrative action would, at a minimum, have to be long-standing before it could be fairly inferred that Congress has acquiesced in it, and, in this connection, Customs has concluded that the decisions in C.S.D. 84–97 (85–10), dated June 22, 1984, and ORR Ruling 218551, dated January 29, 1986, were not "long-standing" at the time of the March 4, 1988, official notice of reconsideration (53 FR 6996). *Compare, Toyota Motor Sales U.S.A., Inc.* v. *United States*, 7 CIT 178, 193–194 (1984), *aff'd.*, 3 Fed. Cir. 93 (1985) (three-year practice not longstanding).

Moreover, where an agency interpretation of existing legislation is plainly erroneous, as in the present instance, it is well settled that Congress must give express consideration or make some specific reference to the interpretation in the later legislation, in order to ratify it. See, *Kristensen* v. *McGrath*, 179 F.2d 796, 803–804 (D.C.

Cir. 1949), *aff'd.*, 340 U.S. 162; *United States* v. *Missouri Pacific Railroad Co.*, 278 U.S. 269, 280 (1929). Implied repeal, which, as already noted, would otherwise be the case here, is not a preferred principle of statutory construction. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

POLICY CONSIDERATIONS

While a general purpose, or policy, of the FTZA may be said, at least partly, to be to assist American business and labor through the encouragement of manufacturing, it must be remembered that the purpose of a law may properly be achieved only within its established statutory framework, *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375, 392 (1970), and cannot sanction the disregard of specific statutory requirements (in this case, those of the fourth proviso) merely because they are perceived as inimical or unsuited to achieving this purpose in a particular case. *Commissioner of Internal Revenue* v. *Gordon*, 391 U.S. 83, 91–93 (1968). In this regard, the rulings under review amount, in fact, to a legislative amendment, rather than an interpretation, of the FTZ law currently in force, which is the exclusive province of Congress. *Accord, e.g., Petri* v. *F. E. Creelman Lumber Co.*, 199 U.S. 487, 495 (1905).

"CLEARLY WRONG" STANDARD

The rulings are not subject to the "clearly wrong" standard of section 177.10(b) because they are not rulings regarding a rate of duty or charge within the contemplation of this regulation, *accord, American Air Parcel Forwarding Co.* v. *United States*, 7 CIT 231, 234–235 (1984) (a ruling relating to the valuation of merchandise, and not to its classification, held not covered by section 177.10(b)); *Old Republic Ins. Co.* v. *United States*, 645 F. Supp. 943, 948 (CIT 1986). Nevertheless, it is Customs' view that because the rulings are without support in the law, the "clearly wrong" standard would be met if it were applicable.

There is no need for the publication of another notice of reconsideration. In addition to the fact that the March 4, 1988, Federal Register notice (53 FR 6996) fully and fairly articulated the subject matter concerned, as evidenced by the depth and detail of the many comments submitted by those participating in this administrative process, another notice would be unwarranted and pointless in any event because "comments from the public at large cannot change the essentially legally correct result." *National Juice Products Association* v. *United States*, 628 F. Supp. 978, 994 (CIT 1986).

CONCLUSION

In view of the foregoing, and following careful consideration of the comments received and further review of the matter, Customs has determined to revoke C.S.D. 84–97, C.S.D. 85–10 and ORR letter ruling 218551, inasmuch as there is no authority in the Foreign

Trade Zones Act permitting imported merchandise to be considered exported when it is sent to a foreign trade zone in the United States for manufacturing.

DRAFTING INFORMATION

The principal author of this document was Russell A. Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 18, 1988.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 28, 1988 (53 FR 52411)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 122

WITHDRAWAL OF PROPOSED CUSTOMS REGULATIONS AMENDMENT CONCERNING THE REPORTING REQUIREMENTS FOR AIRCRAFT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Withdrawal of proposed rule.

SUMMARY: This document withdraws a proposal to amend the Customs Regulations relating to the reporting requirements for aircraft arriving in the U.S. from a foreign location. Customs had proposed that certain information regarding the passengers on such aircraft generally be required to be submitted to Customs prior to the arrival of the aircraft at the first port of entry. It was noted that this would permit Customs to query the Treasury Enforcement Communications System (TECS) prior to the arrival of air passengers and to thereby more efficiently and effectively process those persons.

After consideration of the comments received in response to the proposed rule, proposals for a voluntary and evolutionary advance passenger information program received from national and international airline trade associations and inquiries of several airlines indicating a willingness to participate in testing such a program, Customs has concluded that it should encourage the airline industry effort to voluntarily explore the benefits which an advance passenger information program will provide. Therefore, the proposal is being withdrawn.

DATE: Withdrawal effective December 28, 1988.

FOR FURTHER INFORMATION CONTACT: Robert Heiss, Office of Passenger Enforcement and Facilitation (201)–566–5607.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 14, 1988, Customs published a notice in the Federal Register (53 FR 26604), proposing to amend § 122.42, Customs Regulations (19 CFR 122.42), relating to the entry of aircraft arriving in the U.S. from a foreign location.

The proposal would have implemented a portion of the arrival and reporting provisions of the Anti-Drug Abuse Act of 1986 (Pub. L. 99–570) as to aircraft arriving from a foreign location and carrying passengers. The aircraft pilot, or person authorized on his behalf, would have been required to provide a list of passengers, along with their respective dates of birth and passport numbers, to Customs at the airport of first arrival prior to the arrival of the aircraft.

The proposal noted that the procedures established by the regulatory amendment would permit Customs to query the Treasury Enforcement Communications System (TECS) and to thereby more efficiently and effectively process arriving air passengers.

DISCUSSION OF COMMENTS

Seventy-one comments were received in response to the proposed rule. Commenters included governmental and nongovernmental organizations as well as airline trade associations, individual airlines, and general aviation interests. Although the proposal would not have applied to general aviation aircraft being flown on a noncommercial basis, comments from that source indicated some confusion on the matter. The comments received from other commenters generally noted that, while the purpose of the proposal was commendable, they could not support it. They noted legal impediments, operational and technical difficulties, associated costs, and that the proposal would be anti-facilitative. Further, trade associations representing the major commercial U.S. flag and foreign flag airlines have proposed a voluntary and evolutionary advance passenger information program and several airlines have indicated a willingness to participate in testing such a program.

CONCLUSION

In accordance with the above discussion and in order to pursue the airline industry proposal for a voluntary participation program, Customs is withdrawing the proposal to amend § 122.42, Customs Regulations (19 CFR 122.42).

DRAFTING INFORMATION

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: December 6, 1988.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 28, 1988 (53 FR 52432)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 88-1334)

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF-APPELLEE *v.* UNITED STATES, DEFENDANT-APPELLANT

Wayne Jarvis, Wayne Jarvis, Ltd., of Chicago, Illinois, argued for plaintiff-appellee. With him on the brief was *Paul McCambridge*, of Tribler & Marwedel, Chicago, Illinois, of counsel.

A. David Lafer, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellant. With him on the brief were *John R. Bolton*, Assistant Attorney General and *David M. Cohen*, Director.

Appealed from: U.S. Court of International Trade.
Chief Judge RE, *Judge* WATSON and *Judge* AQUILINO.

(Decided December 22, 1988)

Before MARKEY, *Chief Judge*, SMITH, and BISSELL, *Circuit Judges*.

BISSELL, *Circuit Judge*.

The interlocutory order of the United States Court of International Trade, *see Washington Int'l Ins. Co.* v. *United States*, 678 F. Supp. 902 (Ct. Int'l Trade 1988), denying the government's motion to strike the demand of Washington International Insurance Co. (Washington) for a jury trial, is reversed.

BACKGROUND

A cargo of cheese became unsuitable for sale during shipment into the United States. The United States Customs Service (Customs) appraised and liquidated the merchandise at an export value of $160,000. As the importer's surety, Washington paid the liquidated duties and protested the appraisal, complaining that the cheese should have been valued at the salvage price of $7,406.08. Customs denied the protest and Washington subsequently brought suit against the United States in the Court of International Trade under 28 U.S.C. § 1581(a) (1982).

Washington demanded a jury trial and the government moved to strike. The Court of International Trade granted a motion by Wash-

ington to have the issue resolved by a three-judge panel. *Washington Int'l Ins. Co.* v. *United States*, 659 F. Supp. 235 (Ct. Int'l Trade 1987). The court, with Chief Judge Re dissenting, denied the motion to strike under the Seventh Amendment to the United States Constitution. *Washington*, 678 F. Supp. at 917. Thereafter, the order was certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(1) (1982).

ISSUES

1. Whether 28 U.S.C. § 1876 (1982) grants the right to a jury trial in the Court of International Trade.

2. Whether the Seventh Amendment guarantees the right to a jury trial in a Court of International Trade action against the United States under 28 U.S.C. § 1581(a).

OPINION

A right to a jury trial in federal court must arise out of the Seventh Amendment or be granted by a federal statute. *See* Fed. R. Civ. P. 38(a). Washington contends that 28 U.S.C. § 1876 grants and the Seventh Amendment guarantees a right to trial by jury in this case.

I

We agree with the Court of International Trade that section 1876 does not grant Washington a right to a jury trial. *See Washington*, 678 F. Supp. at 905, 917. Section 1876 is an enabling statute which simply "sets forth the necessary mechanisms for the court to conduct a jury trial." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 63, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3775. It does not specify which actions entitle parties to jury trials, but rather sets forth the procedures to be followed when a Court of International Trade action is tried before a jury. *See* 28 U.S.C. §.1876. A party "in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute." *Lehman* v. *Nakshian*, 453 U.S. 156, 168 (1981). Section 1876 does not affirmatively and unambiguously grant Washington a trial by jury in this action against the United States.

II

The Seventh Amendment preserves the right to a jury trial in those actions in which the right existed at common law when the amendment was adopted in 1791. *See Dimick* v. *Schiedt*, 293 U.S. 474, 476 (1935). An action *against* the government, however, is not a suit at common law within the purview of the Seventh Amendment. "It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions *against* the Federal Government." *Lehman*, 453 U.S. at 160 (emphasis supplied); *see also Galloway* v.

United States, 319 U.S. 372, 388–89 (1943) (noting that the right to a jury trial did not exist at common law for monetary claims against the United States).

The Court of International Trade held, however, that *Tull* v. *United States*, 107 S. Ct. 1831 (1987), requires the right to a jury trial even in actions *against* the government under section 1581(a). *Washington*, 678 F. Supp. at 917. In *Tull*, the Supreme Court considered a suit brought *by* the government seeking civil penalties under the Clean Air Act. *Tull*, 107 S. Ct. at 1833. The Court held that the right to a jury existed because such a suit was "clearly analogous to the 18th-century action in debt," an action which carried the right to a jury trial. *Id.* at 1836. Washington argues here that the common law action in debt against the customs officer individually for recovery of excess customs duties—an action wherein the right to a jury trial at least arguably existed—is the substantial equivalent of an action under section 1581(a) and therefore gives rise to the jury trial right.

A section 1581(a) suit against the United States is quite different from a suit against an individual. Sovereign immunity shields the United States from suit unless immunity is waived. *Lehman*, 453 U.S. at 160. When Congress waives immunity, a "plaintiff has a right to a trial by jury only where that right is one of 'the terms of [the Government's] consent to be sued.' " *Id.* (quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976)). Because actions *against* the government are not analogous to actions *by* the government, *Tull* does not require the Court of International Trade to grant Washington's jury demand.

CONCLUSION

Because neither section 1876 grants nor the Seventh Amendment guarantees the right to a jury trial, we reverse and instruct the Court of International Trade to strike Washington's demand for a jury.

REVERSED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

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Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–164)

AMERICAN PERMAC, INC., BOEWE SYSTEM & MACHINERY, INC., AND BOEWE MASCHINENFABRIK, GMBH, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 85–01–00050

Before WATSON, *Judge.*

[Remanded in part, affirmed in part.]

(Decided December 1, 1988)

Barnes, Richardson & Colburn (*Rufus E. Jarman, Jr.* and *Sandra Liss Friedman*) for the plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrencis*) for defendant.

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* This action is brought by Boewe Maschinenfabrik, GmbH ("Boewe"), a West German manufacturer of dry cleaning machinery, and American Permac, Inc. ("API"), Boewe's American distributor. The plaintiffs contest the final results of a periodic review with regard to dry cleaning machinery imported by plaintiffs between July 1, 1979 and June 30, 1980. 50 Fed. Reg. 1256 (January 10, 1985). The International Trade Administration of the Department of Commerce ("ITA") conducted this annual review pursuant to Section 751(a) of the Tariff Act of 1930, 19 U.S.C. 1675(a), as a result of the outstanding antidumping finding which was published by the Department of Treasury under the Antidumping Act of 1921. 37 Fed. Reg. 23715 (November 8, 1972).[1]

Plaintiffs specifically allege that the ITA failed to allow a "level of trade" adjustment to foreign market prices in violation of 19 U.S.C. 1677b(a)(4)(B) and 19 C.F.R. 353.19. As an alternative, plaintiffs claim that the ITA erred in refusing to allow adjustments to foreign market prices for other differences in circumstances of sales between the U.S. and German markets, including adjustments for

[1]The Trade Agreements Act of 1979 replaced the Antidumping Act of 1921 with a new law as part of Title VII of the Tariff Act of 1930. *See* Pub. L. 96–39, 93 Stat. 150 (1979). The function of administering the antidumping law was simultaneously transferred from the Department of Treasury to the Department of Commerce. Commerce was thereby required to continue enforcement of all dumping findings of the Treasury Department which remained in effect on January 1, 1980. *See* 45 Fed. Reg. 20511 (March 28, 1980).

bad debt expenses, credit insurance premiums, servicing expenses, warehousing expenses, traffic expenses, sales management expenses, and sales office expenses. Further, plaintiffs claim that the ITA erred in refusing to adjust the foreign market price for losses incurred in reselling the used trade-in-machinery. Finally, plaintiffs allege that the ITA erred in failing to reduce the foreign market price by the amounts of early payment discounts and that the ITA improperly used confirmation dates, rather than dates of invoices and/or delivery, to select the sales subject to review.

DISCUSSION

Plaintiffs allege that the ITA's failure to make adequate adjustments for differences in the levels of trade between the U.S. and foreign market is largely responsible for the ITA's determination of sales at less-than-fair value at the rate of 30.05 percent.

The parties do not dispute that all sales of dry cleaning machinery in Germany were made by Boewe directly to end-users, and that Boewe's U.S. subsidiary, API, made the majority of sales in the United States on a wholesale basis to distributors.

Plaintiffs argue, therefore, that they were entitled to a specific adjustment lowering foreign market prices in order to account for this difference and make a fair "apple-to-apple" comparison pursuant to 19 U.S.C. 1677b(a)(4)(B) and the implementing regulations 19 C.F.R. 353.19.[2]

Plaintiffs advocated several alternative methods to measure or quantify the appropriate amount of the level of trade adjustments during the proceedings below. In addition to arguing that a 30 percent discount from the list price, which was given to all distributors in the United States, represented the appropriate adjustment, plaintiffs suggested several other methods of measuring the adjustment and provided substantiating information necessary to implement those methods.

Plaintiffs submitted a detailed accounting study of the actual expenses which Boewe would not have to incur in Germany if it sold the merchandise to distributors, rather than to end-users. Plaintiffs argue that these expenses represent precisely the amount of an appropriate level of trade adjustment.

Plaintiffs also furnished data relating to its sale in Austria through a distributor and argued that, since Austrian and German

[2] 19 U.S.C. 1677b(4)(B) provides:

other adjustments.—In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(B) other differences in circumstances of sales;

then due allowance shall be made therefor.

19 C.F.R. 353.19 provides:

The comparison of the United States price with the applicable price in the market of the country of exportation (or, as the case may be, the price to or in third country markets) generally will be made at the same commercial level of trade. However if it is found that the sales of the merchandise to the United States or in the applicable foreign market at the same commercial level of trade are insufficient in number to permit adequate comparison, the comparison will be made at the nearest comparable commercial level of trade and appropriate adjustments will be made for differences affecting price comparability.

markets are very similar, the actual sale prices to distributors in Austria is a reliable and acceptable measurement of a level of trade adjustments to their home market prices. The third method suggested by plaintiffs involved the use of the price structure of another German company, Seco, which was also subject to this administrative review. Seco did have sales of dry cleaning machines in Germany during the relevant period to both end-users and distributors. Finally, plaintiffs suggested that the ITA measure the level of trade adjustment by reference to plaintiffs' home market sales of forms handling machinery, which were made at both levels of trade, but which were not subject to this review.

Plaintiffs assert that the ITA's failure to make a level of trade adjustment, despite plaintiffs' exhaustive submissions of substantiating data, reflects the general reluctance of the ITA to grant this adjustment under any circumstances. In support of this assertion, plaintiffs refer to the ITA's *Study of Antidumping Methodology And Recommendation For Statutory Change*, (1985), page 56,[3] which states:

> There is no statutory requirement that we make a level-of-trade adjustment when comparing sales at different levels of trade. The effect of differences in level of trade upon price comparability can often be measured by the quantity discounts given; when quantity discounts are not given, we have found it difficult, if not impossible, to determine the existence of and measure any such effect. Thus, the Department is considering eliminating the level-of-trade provision from its regulations.

Defendant in this action does not argue that this adjustment is not required by law, but maintains that no adjustment is appropriate in this case, because plaintiffs failed to quantify this adjustment. In the notice of the final results of this review, the ITA provided the following explanation:

> When there were no contemporaneous home market sales through agents, we compared sales to distributors in the U.S. with direct sales to end-users in the home market, with no adjustment for level of trade differences in the absence of adequate quantification of such differences.

50 Fed. Reg. at 1259.

Defendant alleges that all methods suggested by plaintiffs to measure the levels of trade adjustments are completely speculative. Moreover, defendant submits that there is no data which a respondent can supply to quantify the difference between the United States and foreign level of trade when only one level of trade existed in the home market.

With regard to the detailed cost data provided by plaintiffs to measure their distribution-related expenses, defendant states:

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[3]This study was prepared by the Department of Commerce and submitted to Congress pursuant to § 624 of the Trade and Tariff Act of 1984, Pub. L. 98-573, 98 Stat. 3024.

> Commerce has consistently rejected comparisons between cost of sales in the U.S. market and cost of sales in the home market as support for claimed adjustments for differences in levels of trade because they do not demonstrate that the differences in selling costs are due only to different levels of trade. The differences between the costs in the U.S. market and the costs in the home market are too disparate to attribute the differences in selling costs *only* to levels of trade. Thus, a level of trade adjustment can be measured accurately only when sales occur in the home market at two separate levels of trade. Only in that situation * * * the number of variables that could affect selling price are reasonably minimized and the cost differences attributable to level of trade adequately isolated.[4]

Consequently, defendant asserts that plaintiffs failed to meet their burden of proof to establish an entitlement to a level of trade adjustment relying on *Fundicao Tupy S.A.* v. *United States,* 678 F. Supp. 898 (CIT 1988) *affd,* No. 88–1233, slip op. (CAFC 1988).

The Court finds that the ITA's determination that plaintiffs failed to establish their entitlement to the level of trade adjustment is not supported by substantial evidence on the record, is not reasonable, and is not in accordance with the law.

In *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1575 (1983), the Court of Appeals analyzed the legislative purpose of the antidumping law as follows:

> Congress sought to afford the domestic manufacturer strong protection against dumping, seeming to indicate that the Secretary should err in favor of protectionism * * *. On the other hand, the Secretary is directed to make a fair and equitable valuation, which may reduce the antidumping margin as a result of downward adjustments to foreign market value.

Even though the two competing purposes of the legislation may seem to conflict with each other, they do reflect the general policy which is designed to protect domestic industries from unfair trade practices of their foreign competitors, while providing freedom for fair trade. In fact, these two purposes of the statute complement, rather than conflict with each other.

In order to make a fair and equitable determination and separation of unfair sales practices from those which are legitimate, the statute mandates the administering authority to ensure that the prices used for determining the foreign market value and the U.S. prices of the merchandise are based on equivalent commercial terms. When such terms are not found to be similar, the implementing regulations require the administering authority to make appropriate adjustments to foreign prices in arriving at fair market value of the merchandise to be used for comparison to the U.S. prices.

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[4]Defendant's brief, pp. 19–20, footnote omitted.

The Court can find nothing in the language of either the statute or the regulations that would require plaintiffs to trace precisely and conclusively the exact level of impact the difference in the levels of trade might have on their home market prices. To the contrary, 19 U.S.C. 1677b(a)(1) contains an economic presumption that certain major differences in commercial terms are bound to distort the price comparison. The implementing regulation, § 19 C.F.R. 353.19, therefore, properly requires that the price comparison be made "at the same commercial level of trade," and that adjustments be made if the comparison is not made at the same levels of trade.

Defendants' reliance on *Tupy, supra,* is misplaced. The court upheld the ITA's denial of this adjustment in *Tupy,* because plaintiffs in that case failed to provide any home market data necessary to quantify the adjustment. At the same time, the court recognized specifically that "it is a legal and administrative fact of life that the measurement of this [adjustment] * * * is *a duty* of the ITA."[5] In order to be able to fulfill that primary duty, the ITA is vested with "the authority to impose such *reasonable* burdens of proof on the parties to the investigation as may be necessary to reach a final determination."[6]

The Court does not find the burden of proof imposed on plaintiffs in this case to be reasonable. The ITA's requirement that plaintiffs provide the actual price information with regard to home market sales to distributors, which the ITA knew did not exist, is clearly unreasonable, where the very absence of those sales is the legal prerequisite for the level of trade adjustment. The estimation of this adjustment is implicitly required by law, which prescribes this adjustment precisely because no actual sales at a distributors' level of trade existed in Germany. The burden of proof imposed by the ITA in this case, and the ITA's refusal to use any data other than actual, but nonexisting, wholesales prices traps plaintiffs in a vicious circle and is beyond any standard of reasonableness.

The courts have consistently recognized and upheld the adjustments for various differences in circumstances of sales between the two markets in order to effectuate the fair "apple-to-apple" comparison between the U.S. and foreign market prices. In *Silver Reed America, Inc., et. al.* v. *United States, et. al.,* No. 88–133, slip op. at 11 (CIT, 1988), the court specifically rejected the burden of proof imposed by the ITA with regard to the level of trade adjustment as unreasonable.

> [D]efendant's rejection of Silver's proof * * * imposes a "catch-22" burden of proof on Silver that makes it virtually impossible for Silver to qualify for a level of trade adjustment. Such unreasonable burden of proof must be rejected.

[5] *Tupy, infra,* at 900, emphasis added.
[6] *Id,* emphasis added.

The administering agency possess the expertise necessary to estimate the hypothetical price to distributors in Germany and, as we found in *Tupy,* the ITA may accept "evidence as to what costs might be in certain hypothetical situations."[7] Even though the ITA was not required to use plaintiffs' estimations of the adjustments, it could utilize plaintiffs' data to arrive at its own estimates. The ITA may not reject plaintiffs' submissions as purely speculative merely because they contain certain inevitable estimations.

In affirming our decision in *Tupy,* the Court of Appeals stated that it would be too speculative "to assume that the cost differential is the same in Brazil as in the United States."[8] Plaintiffs in this case, however, provided the very information with regard to their *home market* which was found lacking in *Tupy.* Consequently, while the court found that it would be too speculative to determine the difference in the levels of trade between the U.S. and foreign market exclusively on the basis of costs and sales practices within the U.S. market, the extensive and verifiable home market data, which was provided by plaintiffs in this case, allows for an acceptable determination of the adjustment for the difference between the levels of trade in the U.S. and German markets.

The ITA argues that the adjustment should not be granted because plaintiffs failed to establish that the difference between the U.S. and foreign prices of the merchandise was "wholly or partly due to" any such difference in the levels of trade between the two markets. This argument, however, is contrary to the ITA's own regulations which treat any difference in circumstances of sales between the two markets as equal to the costs of such difference rather than tracing their actual effect on prices. Section 353.15(d) of the regulations states specifically that "[i]n determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller."

In *Smith-Corona,* the court found the use of costs criteria to be reasonable:

> The implicit assumption of 19 C.F.R. 353.15(d) is that such differences very likely exist where there exist differences in cost * * *. We hold only that, absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related * * *. The use of the cost criteria to satisfy the quantum of evidence required to establish entitlement is reasonable.[9]

The additional costs of selling the merchandise to the end-users in Germany were amply provided by plaintiffs in this case. Unless the ITA has specific evidence that these additional costs are not re-

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[7] *Id.*
[8] *Fundicao Tupy, S.A.* v. *United States,* No. 88–1233, slip. op. at 2 (CAFC 1988).
[9] *Smith-Corona, supra,* at 1577.

flected in the prices of the merchandise in West Germany, the ITA may not reject this data as too speculative. Consequently, the Court remands this issue to the agency.

As an alternative to the level of trade adjustment, plaintiffs claim a number of specific adjustments for various differences in the selling expenses between the U.S. and West German markets. These specific adjustments stem from the fact that in the home market plaintiffs incur additional selling expenses when selling their product to the individual end-users.

Plaintiffs allege that all of these adjustments are necessary to offset the ITA's failure to grant the overall adjustment for the difference in the levels of trade between the two markets. Plaintiffs assert that they do not incur these particular expenses in their sales to distributors in the U.S. market, because the U.S. distributors, by definition, assume these selling expenses, and, therefore, they receive appropriate discounts.

Since the Court finds that plaintiffs are entitled to the level of trade adjustment, we do not need to address plaintiffs' alternative claims for these specific differences in circumstances of sales between the two markets. The statute and the regulation allow for adjustments for the difference in directly related selling expenses in addition to the initial requirement that the administering authority select sales which are made on an equivalent commercial basis in the two markets.

Section 19 U.S.C. 1677b(a)(1)(A) requires that the foreign market prices to be selected for comparison shall reflect "similar merchandise * * * the usual wholesale quantities and * * * the ordinary course of trade." Once the U.S. and foreign market prices are properly selected and are adjusted to the common or comparable commercial denominator, 19 U.S.C. 1677b(a)(4)(B) further provides that appropriate adjustments shall be made for other directly related differences in circumstances of sales between the two markets.

Since the alternative adjustments claimed by plaintiffs in this case are specifically attributable to the difference in the levels of trade between the two markets, rather than other additional differences in selling expenses, they would not be necessary once the level of trade adjustment is made. Moreover, it would be within the ITA's discretion to deny these specific adjustments in order to avoid double counting, once the level of trade adjustment is granted.

Consequently, the Court will not review at this juncture the ITA's requirement that in order to qualify as "directly related," the selling expenses must be attributable to a particular individual sale, rather than a group of sales, and/or be a condition of each specific sale under review.

The two remaining issues raised by plaintiffs concern the use of confirmation dates, rather than the dates of invoice or delivery, in the selection of sales subject to review and the ITA's refusal to de-

duct the early payment discounts of 2 percent on all sales in their home market.

The Court finds that plaintiffs fail to meet their burden of proof that these practices of the ITA are not reasonable, not supported by administrative record, or are otherwise contrary to the applicable law.

Plaintiffs merely assert that the date of each sale which took place in Germany should be determined under the German law, pursuant to generally accepted principles of conflict of laws.

The Court does not agree with plaintiffs' position that the choice-of-law principles control the ITA's selection of sales subject to review. Moreover, this approach would not be desirable, because the ITA must administer the law with a degree of uniformity without having to change its practice depending on the foreign laws in the country of exportation under review.

Apart from admitting that the use of delivery dates would be beneficial to plaintiffs, they fail to demonstrate in what way the ITA's long-standing practice is either illegal or unreasonable. The ITA uses the date of sale when all terms of the sale are established, which is the date of order-confirmations in this case. Plaintiffs allege that some order-confirmations may be cancelled, but fail to specify how many, if any, such cancellations took place during the relevant period, whether they were made without any contractual penalties, or any other substantiating information which would imply the inherent unfairness of using the confirmation dates in their case.

Similarly, plaintiffs allege that the ITA should use foreign prices minus the 2 percent discounts for early payment without regard to whether these discounts were actually utilized by Boewe's purchasers in the home market. Plaintiffs complain that the ITA allowed these discounts "only" when they were actually given as a result of prompt payments. In support of their proposition, plaintiffs rely on prior value statutes concerning the appraisement of merchandise for customs purposes under which discounts freely offered were taken into account in arriving at a legal value of the merchandise.

The Court does not find that the customs valuation law has any weight in an antidumping case which is subject to the specific requirement of Section 1677b(a)(1) of the Act that the administering authority utilize prices at which the merchandise is actually "sold" in the home market. If plaintiffs' customers chose not to utilize the discount offer, the full amount represented the price at which the merchandise was actually sold. Consequently, plaintiffs fail to show that the ITA's determination to use prices actually paid by Boewe's customers is unreasonable or contrary to the law.

CONCLUSION

The Court concludes that the ITA has failed to apply a reasonable standard in determining that plaintiffs do not qualify for a level-of-

trade adjustment. This issue is remanded to the ITA for reconsideration in accordance with the opinion of this Court. Commerce shall make the necessary adjustments consistent with this opinion and file with the Court within forty-five days a supplemental record explaining its redetermination. If any party wishes to challenge the remand results, it shall confer with opposing counsel and submit a briefing schedule within 10 days of the determination or remand.

The ITA determination with regard to the remaining issues raised by plaintiffs in this case is hereby affirmed.

SO ORDERED.

(Slip Op. 88–165)

KALAN INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88–12–01200

Before NICHOLAS TSOUCALAS, *Judge.*

[Plaintiff's motion for summary judgment granted in part and denied in part; defendant's cross-motion for summary judgment granted in part and denied in part.]

(Decided December 1, 1988)

Sidney N. Weiss, for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*James A. Curley*), for defendant.

MEMORANDUM OPINION

TSOUCALAS, *Judge:* This action is before the Court to determine the appropriate classification of merchandise described in the entry papers as key tags. The merchandise consists of rectangular plastic, measuring $2\frac{1}{2}'' \times 1\frac{3}{8}'' \times \frac{1}{4}''$ with any one of a number of whimsical phrases printed on it. A split metal ring $\frac{7}{8}''$ in diameter is linked to the tag through a smaller metal link.

The merchandise, imported from the Republic of Korea (ROK) and entered through the port of Philadelphia, Pennsylvania on October 14, 1987, was liquidated under item 740.41, the Jewelry and Related Articles provision of the Tariff Schedules of the United States (TSUS):

> Jewelry and other objects of personal adornment not provided for in the foregoing provisions of this part (except articles excluded by headnote 3 of this sub-part), and parts thereof:
> Valued over 20 cents per dozen pieces or parts:
> * * * * * * *
> Other.....11% ad val.

Plaintiff, Kalan Inc. (Kalan), contests the classification and argues that the merchandise is properly classifiable under the Rubber and Plastics Products provision, item 774.58, TSUS:

> Articles not specially provided for, of rubber or plastics:
> * * * * * * *
> Other:
> * * * * * * *
> Other..... 5.3% ad val. (Free [for ROK under the Generalized System of Preferences])

DISCUSSION

In addressing the issue whether the imported merchandise is inclusive under item 740.41 or item 774.58, TSUS, the Court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878 (1984), *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984). Plaintiff bears the burden of overcoming the presumption of validity of the United States Customs Service's (Customs) classification. *Id.*

The initial question to be resolved is whether key rings and key chains are "alike," since headnote 2(a) of the Jewelry and Related Articles provision lists key chains as an exemplar:

> 2. For the purposes of this subpart—
> (a) the term "*jewelry and other objects of personal adornment*" (items 740.05 through 740.38 [sic], *includes* rings, earrings and clips, bracelets (including watch bracelets and identification bracelets), necklaces, neck chains, watch chains, *key chains,* brooches, tie pins and clips, collar pins and clips, cuff links, dress studs, buttons, buckles and slides, medals, military, fraternal and similar emblems and insignia (including those prescribed for military, police, or other uniforms), fobs, pendants, hair ornaments (including barrettes, hair-slides, tiaras, and dress combs), *and similar objects of personal adornment,* but *does not include*—
>
> (i) *articles described in headnote 2(b)* of this subpart * * *
> (Emphasis in original in part and provided in part).

In contradistinction to Customs' position, Kalan maintains that the subject key rings are not like "key chains" nor are they "similar objects of personal adornment" identified in the foregoing headnote. *United States* v. *R.J. Saunders & Co.,* 45 CCPA 63, C.A.D. 674 (1958), decided under the repealed jewelry provision of the Tariff Act of 1939, upheld the classification of base metal key rings as key chains on the grounds that both served the similar function of holding keys together. In defining the scope of what may be appropriately designated as an article of jewelry or personal adornment, *Saunders'* similarity in function rationale is instructive because it demonstrates precisely the type of liberal interpretative rule that the 1960 revisions sought to avert. "The early judicial and administra-

tive rulings tended to interpret the [now repealed] provisions * * * as broadly as possible, causing a number of base-metal articles of a purely utilitarian nature and having no relationship to the jewelry trade to be classified as jewelry and related articles." The United States Tariff Commission, *The Tariff Classification Study* 320, 321 (1960) (TCS).

To narrow the scope of items dutiable at higher tariff rates, the Jewelry and Related Articles provision of the Tariff Act of 1960 instituted a classificatory scheme whereby the goods are distinguished according to their functional traits *and* compositional characteristics. *TCS* at 320–24.

Headnote 2(a) covers all articles which serve an ornamental function of personal adornment, irrespective of their material content, and identifies key chains as an exemplar. A classificatory determination may not, however, rely exclusively upon a comparison with a single exemplar where multiple are listed. The Court must take into account the essential characteristics and purposes that unite the articles enumerated. *Nissho-Iwai American Corp.* v. *United States,* 10 CIT 154, 641 F. Supp. 808 (1986); *Kotake Co.,* v. *United States,* 58 Cust. Ct. 196, C.D. 2934, 266 F. Supp. 385 (1967). The meaning of "key chain" thus cannot be divorced from the commonalities that all the listed exemplars exhibit.

The detailed items under headnote 2(a) are articles that are meant to be worn or attached to the person or to wearing apparel for ornamental purposes. Further, these are goods which are sold through channels of the jewelry trade. *See TCS* at 321–23. At the hearing, Customs attempted to show that the message printed on the key rings has a significant ornamental value because "they are calculated to attract members of the opposite sex." *Defendant's Brief in Reply to Plaintiff's Opposition to the Cross-Motion for Summary Judgment* at 6. Louis Piropato, a National Import Specialist of the United States Customs Service, fastened the subject merchandise on his belt loop by means of application of an extrinsic clipping device. The endeavor illuminated, at best, that any object has the potential to be an item of ornament, by virtue simply of attachment to the person. The determinative test under headnote 2(a) is not, however, whether the item may have incidental decorative use, but rather whether this is its primary function. *See TCS* at 321–22.

Indeed, Customs does not dispute that the key rings are specifically designed to hold keys together to provide ease of accessibility. Additionally, the record does not contain any evidence that the subject merchandise is sold at jewelry stores or otherwise circulated through channels of the jewelry trade.

The key rings before the Court appear to be small non-precious utilitarian articles excepted from inclusion under the Jewelry and Related Articles provision. Headnote 2(b) states that: "*small [utilitarian] articles ordinarily carried in the pocket, in the handbag, or*

on the person for mere personal convenience" (emphasis in original) will nonetheless be designated as jewelry if they are made:

> of precious metal (including rolled precious metal), of precious stones, of natural pearls, of precious metal (including rolled precious metal) set with semiprecious stones, cameos, intaglios, amber, or coral, or of any combination of the foregoing * * *

Superior Headnote to items 740.05 through 740.15, TSUS. Headnote 2(b) lists as exemplars:

> cigar and cigarette cases and holders, spectacle cases, coin purses, card cases, powder boxes, pocket combs, lipstick holders, money clips, and similar articles ordinarily carried in the pocket, in the handbag, or on the person for mere personal convenience, but does not include—
>
> (i) articles described in headnote 2(a) of this subpart * * *

Thus, the controlling factors under under headnote 2(b) are whether the disputed small article is "carried" for primarily utilitarian purposes and whether it contains precious or semi-precious material. *TCS* at 320–23.

The size of the key rings in question is comparable to the listed exemplars, such as cigar and cigarette cases, coin purses, card cases, and money clips. None, including the subject key rings, features an intrinsic device by which attachment to the person or apparel may ordinarily be accomplished. The key rings also share the distinguishing characteristic of ordinarily being "carried," rather than worn. Their unifying purpose is to facilitate retainment and mobility of regularly used small items, such as cigars and cigarettes, coins, cards, and keys.

In view of their predominantly utilitarian purpose, headnote 2(b) limits the inclusion of small articles under the Jewelry and Related Articles provision to those containing precious or semi-precious ingredients. The rationale for their inclusion is that their material composition imparts a "jewel-like" quality. Further, "[t]hese articles, when composed of precious metals or precious stones, are almost invariably produced by the jewelry industry and sold in channels of trade normally dealing with 'precious-metal' jewelry." *TCS* at 322. It is uncontroverted that the component material in chief value of the subject merchandise is plastic. Further, as noted above, they are not identified with the jewelry industry.

Under these circumstances, the subject product do not fall within the ambit of the Jewelry and Related Articles provision. Headnote 4 supports this finding:

> Small articles ordinarily carried in the pocket, in the handbag, or on the person for mere personal convenience, which are not covered * * * [under headnote 2(b)] are provided for elsewhere in the schedules.

Non-precious items excludable under headnote 2(b) likewise may not be classified under 2(a).

The record does not support Kalan's remaining argument that Customs has a uniform and established practice of classifying articles such as those in issue under item 774.58, TSUS. Nine liquidations under this provision over a one-year period are insufficient to create such a practice. *See Siemens America, Inc.* v. *United States*, 692 F.2d 1382 (Fed. Cir. 1982) (approximately 100 entries over two years are insufficient); *Washington Handle Co.* v. *United States*, 34 CCPA 80, C.A.D. 346 (1946) (twenty-eight entries during one year are insufficient). However, since the foregoing discussion finds that the controverted small non-precious item is clearly one that is ordinarily carried by a person and serves a primarily utilitarian function, it cannot be brought under the Jewelry and Related Articles provision.

CONCLUSION

Plaintiff has met its burden by proving that plastic key rings in question are not properly classifiable under 740.41, TSUS. Their primary function is to serve the personal convenience of retaining keys and their component material in chief value is plastic. While the evidence is inadequate to conclude Customs has an established and uniform practice of classifying them under item 774.58, TSUS, the Court finds that the subject product is properly classifiable under item 774.58, TSUS.

SO ORDERED.

(Slip Op. 88–166)

SAMSONITE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–10–01383

OPINION

[On denial of duty deduction for value of U.S. frame metal in imported luggage, judgment for the defendant.]

(Decided December 2, 1988)

Baker & McKenzie (*William D. Outman, II*) for the plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Kenneth N. Wolf*) for the defendant.

AQUILINO, *Judge:* This action challenges Customs Service denial of a duty deduction under item 807.00 of the Tariff Schedules of the United States ("TSUS") for the value of strips of steel worked in Arizona and delivered to neighboring Nogales in Sonora, Mexico for use in luggage imported into the United States.

As exhibited at trial, when they left Tuscon, the strips were straight, approximately 1⅞ inches wide and 55 inches long, with a pair of parallel rolled ridges running length-wise and some fourteen 3/16-inch holes drilled along the centerline at specified distances and bearing a protective coat of oil. Their cost or value ranged from 95 cents to $1.26. After arrival at plaintiff's assembly facility in Nogales, the strips were (1) bent by machine into a form analogous to a squared-sided letter C, (2) cleansed of their oil coatings, (3) covered on the in-sides with vinyl sheaths and (4) riveted, on the open out-sides, to 6-½ × 15-¾ -inch sheets of plastic, which thereby became the bottom plates of completed "frame assemblies". These resulting, enclosed, rectangular-shaped assemblies were subsequently placed in, and fastened to, sewn bags of vinyl to form light-weight luggage commonly known now by such terms as "soft-side" or "carry-on".

There is no dispute that Customs correctly classified the models covered by the entry in question under TSUS items 706.6235 and 807.00. Rather, the plaintiff seeks a deduction from the duty paid for the value of the steel strips as "fabricated components, the product of the United States" within the meaning of the latter item. It provides for a "duty upon the full value of the imported article, less the cost or value of * * * products of the United States" which

> (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity * * * by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Upon denial of such a deduction, this action ensued.

Discussion

The foregoing three conditions for a deduction are set forth in the conjunctive, and it has been held that each must be satisfied before a component can qualify for duty-free treatment. *E.g., The Proctor & Gamble Distributing Company* v. *United States*, 11 CIT ——, ——, Slip Op. 87–72, at 3 (June 24, 1987).

The first question then is whether the steel strips, which were admittedly fabricated in the United States, "were exported in condition ready for assembly without further fabrication". In *E. Dillingham, Inc.* v. *United States*, 470 F.2d 629, 632 (CCPA 1972), the court stated that the correct starting point for the application of item 807.00 must be the material or article in question, as exported from the United States. In that case, the court held that the mixed fiber mass at issue, as it left this country, required further labor to put it into the condition of a component ready for assembly, and thus disallowance of a deduction was upheld. In *Zwicker Knitting Mills* v. *United States*, 613 F.2d 295 (CCPA 1980), the court concluded that

stitching to close glove fingers was further fabrication within the meaning of item 807.00. And in the *Proctor & Gamble* case, *supra*, the court held that creation of an absorbent diaper core from fabricated U.S. dry lap also entailed further fabrication. In reaching that result, the court stated that the "sewing and knitting cases seem to indicate that * * * operations are fabrication only if they create the basic article." 11 CIT at ——, Slip Op. 87-72 at 4. *Cf. United States* v. *Mast Industries, Inc.*, 668 F.2d 501 (CCPA 1981)(buttonholing and slitting pockets in pants not further fabrication).

Of course, neither sewing nor knitting was the process at issue herein, rather placement of four, corner bends in strips of steel. In *Rudolph Miles* v. *United States*, 567 F.2d 979 (CCPA 1978), the court held that the burning of slots and holes into large steel beams before placement in railway boxcars in Mexico did not amount to further fabrication there. The opinion refers to three earlier decisions, each *sub nom. General Instrument Corporation* v. *United States* and reported at 462 F.2d 1156 (CCPA 1972), 480 F.2d 1402 (CCPA 1973), and 499 F.2d 1318 (CCPA 1974). In the first case, the simple cutting to size of wire for placement in a transistor was not held to be further fabrication, nor was such cutting of U.S. components for capacitors in the second case, or for coils in the third. *See also United States* v. *Texas Instruments Inc.*, 545 F.2d 739 (CCPA 1976) (separation of silicon chips along scored lines not further fabrication).

In the third *General Instrument* case, wire was coiled by means of winding machines, which process involved despooling, forming, cutting, taping and cementing. Here, the plaintiff argues that the "frame-bending operation * * * constitutes less fabrication than that expressly permitted by the Court * * * in *General Instrument III*." Plaintiff's Brief, p. 20. In that case, however, wound wire became, in essence, rewound wire or "capable of immediately entering into the assembly process", to quote from the opinion, 499 F.2d at 1321, whereas in this action plaintiff's straight strips of steel could not have been placed immediately into its bags without the work referred to above.[1] That is, the court finds that the strips were not exported in condition ready for assembly, in contrast, for example, to the steel beams in *Rudolph Miles, supra*, which were not changed in form or shape; only incidental slots and holes were made in them.

Item 807.00 equates "operations incidental to the assembly process" with "cleaning, lubricating, and painting." A regulation of Customs states that components, the product of the United States "will not lose their entitlement to * * * exemption by being subjected to operations incidental to the assembly", 19 C.F.R. § 10.14(a), while another regulation, § 10.16(b), provides examples of such operations as follows:

[1] *See, e.g.*, trial transcript ("Tr."), pp. 42-43. *Compare* Plaintiff's Exhibit 1 *with* Plaintiff's Exhibit 7.

(1) Cleaning;

(2) Removal of rust, grease, paint or other preservative coating;

(3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation;

(4) Trimming, filing, or cutting off of small amounts of excess materials;

(5) Adjustments in the shape or form of a component to the extent required by the assembly being performed abroad;

(6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components * * *; and

(7) Final calibration, testing, marking, sorting, pressing, and folding of assembled articles.

The parties herein do not dispute the nature of the removal of the oil coatings, the encasement of the metal in vinyl and the attachment of the bottom plates. Rather, they have stipulated the issue to be whether the bending of the strips was an incidental operation. On its part, the plaintiff argues that the bending was a "mere adjustment in shape" of the kind contemplated by subsection (5), *supra*.

The court finds on the record before it that the bending process did more than "adjust" the article. The process created the component to be assembled, the essence of which is its configuration. Without the resultant shape, the plastic plate could not be attached so as to constitute the bottom, and the completed frames[2] could not be inserted into plaintiff's bags, thereby, imparting the intended overall form and structural stability of the finished luggage.

The court concludes that item 807.00 and the attendant regulations do not cover a process which was as necessary to the fabrication of the component as it was to subsequent assembly thereof. In fact, 19 C.F.R. § 10.16(c) provides that

> [a]ny significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, * * * whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article.

The plaintiff attempts to equate "incidental" with "insignificant" and thereby argues that the bending process was a minor one allowable under item 807.00. In support of its position, the plaintiff has shown that the bending by machine took some 1.4 percent of the total time required for the assembly process and reflected but 1.5 percent of the value of the frame. *Cf.* Tr. at 56–63.

The magnitude of a particular process in terms of time and cost, however, does not make that process any less one of fabrication, nor

[2] From the beginning, the plaintiff has sought to characterize the steel, whether in strip or bent form, as the "frame". The evidence shows, however, that the metal in its final form and the attached bottom plate, together, comprise the frame. Indeed, the court notes in passing that that term generally connotes enclosure or unity.

does it make the result thereof any less significant. In *United States v. Oxford Industries, Inc.*, 668 F.2d 507, 511 n.11 (CCPA 1981), the court cautioned that cost is but one factor to be considered when making a determination under item 807.00. In *Mast Industries, supra*, the court of appeals pointed to three factors in analyzing procedures claimed to be incidental. It looked at time and cost, as well as at whether the procedure in question was considered "necessary" in the assembly process. Thirdly, the court considered whether the procedure was "so related" to the assembly that it was "logically performed" with it. *See* 668 F.2d at 506.

Here, logic does not necessarily link the bending of the steel to the process of assembly of the luggage, even though the product could not have been assembled without the strips having been bent. In fact, prior to April 1982, the bending was performed in the United States[3], wholly separate from the assembly process in Mexico. Wherever, the bending was more a part of the fabrication of the steel frames than of the assembly of the merchandise. As the court of appeals concluded in *Zwicker, supra*, where the finishing of gloves was found to be further fabrication, that process begun in the United States and completed abroad could not be "incidental to the assembly process".

CONCLUSION

To summarize, the bending in question was not incidental to assembly of a fabricated component exported from the United States in condition ready for assembly without further fabrication. The presumption of correctness that attached to the denial of plaintiff's protest by the Customs Service stands, and judgment must therefore enter in favor of the defendant.

(Slip Op. 88–167)

POTTER-ROEMER, INC., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 88–08–00690

[Injunction pending appeal conditionally granted.]

(Dated December 2, 1988)

Stein Shostak Shostak & O'Hara (*Robert Glenn White*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*A. David Lafer*), Civil Division, United States Department of Justice, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart* and *James R. Cannon, Jr.*) for intervenor.

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[3] *See* Stipulation of Agreed Statement of Facts, para. 9 and Plaintiff's Exhibit 2; Tr. at 42.

MEMORANDUM OPINION AND ORDER

RESTANI, *Judge:* This matter is before the court on motion for injunction pending appeal. Defendants oppose the injunction on the ground that there is no substantial question for appeal, ad evidenced by the court's "summary" dismissal of the action. The court dismissed this action after reading the briefs of the parties, hearing oral arguments and considering the matter. The court made its findings of fact and conclusions of law on the record from the bench. Lack of a written opinion should not be perceived as an indication that no substantial question is raised; the oral opinion sets forth all that is required by law to dispose of the question raised, substantial or not.

This court found lack of jurisdiction to hear plaintiff's complaint under 19 U.S.C. § 1581(i). The applicable law on jurisdiction has been set forth numerous times by this court and the Court of Appeals. Only if plaintiff's remedies under 28 U.S.C. § § 1581(a-h) (1982) are inadequate may plaintiff resort to § 1581(i). *See, e.g., Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 773 (1988). Plaintiff would have had a remedy under § 1581(c) had it satisfied the statutory requirement of participation in the agency proceedings. It did not do so and thus could not avail itself of such remedy. Plaintiff's argument is that it had inadequate notice to participate in the administrative proceedings so as to satisfy the statutory standing requirement that is a predicate to § 1581(c) jurisdiction. *See* 19 U.S.C. § 1516a(a)(2) (1982). Thus, plaintiff argues, through the failure of ITA, not plaintiff, § 1581(c) was rendered an inadequate remedy.

The court set forth, in some detail, in its oral opinion exactly why it concluded that plaintiff had received adequate notice, citing the language of the preliminary determination and explaining its context. The court adheres to that opinion. The court does not, however, find plaintiff's challenge frivolous. The notice is somewhat difficult to interpret, especially for a lay person. The court has concluded, however, that the Government is permitted to assume some knowledge, on the part of noticees, of the antidumping laws, and that all terms need not be explained in detail. Nonetheless, it is inappropriate at this stage in the litigation for the court to rely too heavily upon the factor of whether success on appeal is likely, as such reliance would virtually prevent injunction pending appeal in all cases. In order to decide whether or not to grant an injunction pending appeal, the court also must examine the remaining three factors normally applicable to the granting of injunctive relief.

The court is mindful of *Zenith Radio Corp.* v. *United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). As in *Zenith*, the substantive issue here arises out of an annual review proceeding. If liquidation of the reviewed entries occurs, the Court of Appeals will lose jurisdiction

to hear the appeal, because the action would be rendered moot. Liquidation in such a case constitutes irreparable harm. *Id.*

It is also apparent that the administrative decision which plaintiff seeks to challenge is one which will result in increased duties to plaintiff over and above that which is currently on deposit. As the government will be prevented from collecting amounts owing if liquidation is enjoined, the balance of hardships would tip in defendants' favor. This may be avoided if adequate security is posted. Posting of security will eliminate virtually any hardship to defendants. This will also satisfy the public interest of protection of antidumping duty collections. As the factors of irreparable harm, balance of hardships and the public interest do not favor denial of the injunction, the court believes it would be inappropriate to jeopardize plaintiff's access to appellate review merely because this court believes its ruling is correct. Injunction of liquidation of the entries listed on the Attachment A hereto, pending appeal, will be effective upon posting of security adequate to cover the entire amount potentially owing on the listed entries.

After consultation with the parties the court has determined that a letter of credit in the amount of $345,000 will adequately secure defendants against any harm. Injunction shall be effective as to the United States and its officials twenty-four hours after receipt of notification that the letter of credit is filed in court.

Attachment A

SCHEDULE

Port of Los Angeles, California

Entry No.	Date of Entry	Importer of Record	Importer No.
85–128898–7	12-11-84	Potter-Roemer, Inc.	95–186992100
85–129472–2	06-11-85	Potter-Roemer, Inc.	95–186992100
85–129601–8	06-26-85	Potter-Roemer, Inc.	95–186992100
85–129926–4	09-26-85	Potter-Roemer, Inc.	95–186992100
85–132114–8	12-11-85	Potter-Roemer, Inc.	95–186992100
86–132278–1	02-05-86	Potter-Roemer, Inc.	95–186992100

Port of New York

Entry No.	Date of Entry	Importer of Record	Importer No.
85–338544–8	04-01-85	Potter-Roemer, Inc.	95–186992100
85–377897–4	06-03-85	Potter-Roemer, Inc.	95–186992100
85–418619–6	07-03-85	Potter-Roemer, Inc.	95–186992100
85–418800–0	08-29-85	Potter-Roemer, Inc.	95–186992100
86–196464–4	10-17-85	Potter-Roemer, Inc.	95–186992100

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Item
C88/201	Re, C.J. November 1, 1988	Belwith Int'l Inc.	83-10-01410	Item 534.94 Various rates	Item 72 Vario
C88/202	Re, C.J. November 1, 1988	Belwith Int'l, Inc.	84-1-00054	Item 534.94 Various rates	Item 72 Vario
C88/203	Re, C.J. November 1, 1988	Belwith Int'l Inc.	84-3-00364	Item 534.94 Various rates	Item 72 Vario
C88/204	Restani, J. November 1, 1988	Pharmacia Inc.	87-7-00792	Item 772.85 Various rates for columns Various prov- of schedule 4, TSUS at various rates for sep- aration media Item 799.00 or Item 430.20 various rates for toxins or antitoxins	Item 66 4.9%, 4.5% for co or Item 4.5%, 4.2% separa media Item Free for to antito
C88/205	DiCarlo, J. November 1, 1988	Old Republic Insurance Co.	86-1-00028	Item 379.96 12d per lb. + 22.3%	Item 37 12.1%

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
No. and rate		
27.55 ous rates	Agreed statement of facts	Los Angeles Porcelain knobs
27.55 ous rates	Agreed statement of facts	Los Angeles Porcelain knobs
27.55 ous rates	Agreed statement of facts	Los Angeles Porcelain knobs
61.95 , 4.7%, or 4.3% olumns,	Agreed statement of facts	New York Columns, separation-media, toxins, or antitoxins
799.00 , 4.4% or 4% for ration ia, or 437.76 of duty oxins or toxins		
76.56 %	Izod Outerwear v. U.S., S.O. 85-72	Los Angeles Men's Pullover Jackets

C88/206	DiCarlo, J. November 1, 1988	Pharmacia, Inc.	83–7–00946	711.88 Various rates for columns Various provisions of schedule 4, TSUS for separation media Item 799.00 or 430.20 for toxins or antitoxins
C88/207	DiCarlo, J. November 1, 1988	Pharmacia, Inc.	84–1–00019	Various provisions of schedule 4 at various rates Item 711.88 Various rates
C88/208	DiCarlo, J. November 1, 1988	Pharmacia, Inc.	84–3–00333	Various provisions of schedule 4 at various rates
C88/209	DiCarlo, J. November 1, 1988	Pharmacia, Inc.	84–10–01495	Various provisions of schedule 4 at various rates Item 711.88 Various rates
C88/210	DiCarlo, J. November 1, 1988	Pharmacia, Inc.	85–8–01101	Various provisions of schedule 4 at various rates Item 711.88 Various rates
C88/211	DiCarlo, J. November 1, 1988	Pharmacia, Inc.	86–12–01579	Various provisions of schedule 4 at various rates Item 799.00 or 430.20 at Various rates

Item 661.95 5.5% for columns Item 799.00 5% for separation media Item 437.76 Free of duty for toxins or antitoxins	New York Columns separation, media, toxins, or antitoxins	
Item 799.00 4.8%, 4.7%, or 4.4% Item 661.95 5.3%, 5.1% or 4.7%	Pharmacia Fine Chemicals, Inc. 9 CIT 438 (1985)	New York Separation media used in chromatography, etc. or columns
Item 799.00 4.8%, 4.7% or 4.5%	Agreed statement of facts	New York Separation media used in chromatography, etc.
Item 799.00 4.7%, 4.5%, or 4.4% Item 661.95 5.1%, 4.9% or 4.7%	Pharmacia Fine Chemicals, Inc. 9 CIT 438 (1985)	New York Separation media used in chromatography, etc. or columns
Item 799.00 4.7%, 4.4% or 4.2% Item 661.95 5.1%, 4.7%, or 4.5%	Pharmacia Fine Chemicals, Inc. 9 CIT 438 (1985)	New York Separation media used in chromatography, etc. or columns
Item 799.00 4.8%, 4.7% 4.5%, 4.4% or 4.2% Item 437.76 Free of duty	Agreed statement of facts	New York Separation media or toxins or antitoxins

ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	I
C88/212	Carman, J. November 7, 1988	First American Artificial Flowers	87-5-00652	Item 748.21 22.7%	Ite
C88/213	Rao, J. November 8, 1988	Pitney Bowes, Inc.	78-5-00889	Item 252.90 10%	Ite
C88/214	DiCarlo, J. November 15, 1988	S. Madill, Inc.	84-11-01593	Item 664.10 3.5% Item 680.95 7.6% Item 680.49 3.5% Item 681.21 7.6%	Ite
C88/215	Carman, J. November 16, 1988	Washington International Insurance Co.	85-12-01717	Item 712.49 81% or 7.5%	Ite
C88/216	Carman, J. November 25, 1988	Nom A.B.	82-6-00803	Item 668.04 6.4%	Ite
C88/217	Carman, J. November 25, 1988	Nom Co.	83-2-00284	Item 668.04 5.9%, 6.1% 6.4% or 6.7%	Ite
C88/218	Carman, J.	Nom Co.	84-2-00224	Item 668.04 5.9%, 6.1%, 6.4% or 6.7%	Ite
C88/219	Carman, J. November 28, 1988	Nom Co.	84-5-00606	Item 668.04 5.9%, 6.1% 6.4% or 6.7%	Ite
C88/220	Re, C.J. November 30, 1988	Belwith Int'l Inc.	86-11-01436	Item 534.94 Various rates	Ite
C88/221	Re, C.J. December 5, 1988	Belwith Int'l, Inc.	85-3-00408	Item 534.94 Various rates	Ite

DECISIONS — Continued

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
em 389.62 10%	Agreed statement of facts	New York Artificial flowers
em 252.05 1%	Agreed statement of facts	New York Black calendared paper
em 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77-12-04978	Baline Specially designed parts for Madill logging yarders
em 685.90 7.3% or 6.9%	Agreed statement of facts	New York Speed sensors
em 661.95 5.1%	Noss Co. v. U.S., 753 F.2d 1052 (1985)	New Orleans Radiclones and parts
em 661.95 5.9%	Noss Co. v. U.S., 753 F.2d 1052(1985)	Wilmington Radiclones and parts
em 661.95 4.7%	Noss Co. v. U.S., 753 F.2d 1052 (1985)	New Orleans Radiclones and parts
em 661.95 4.7%	Noss Co. v. U.S. 753 F.2d 1052 (1985)	Wilmington Radiclones and parts
em 727.55 or Item 727.70 Various Rates	Agreed statement of facts	Detroit Porcelain knobs
em 727.55 or Item 727.70 Various Rates	Agreed statement of facts	Los Angeles Porcelain knobs

C88/222	DiCarlo, J. December 6, 1988	Pharmacia Inc.	87-10-01062	Item 711.88 or item 712.49 Various rates or Various provisions of schedule 4 or item 799.00 or item 430.20 Various rates	Ite
C88/223	Re, C.J. December 6, 1988	MCF Footwear Corp.	84-5-00643	Item 700.95 or Item 700.85 12.5%	Ite
C88/224	Re, C.J. December 6, 1988	Mitsubishi Int'l Corp	83-7-01023	Item 700.95 or item 700.85 12.5%	Ite
C88/225	Re, C.J. December 6, 1988	Mitsubishi Int'l Corp.	83-7-01066	Item 700.95 or item 700.85 12.5% Item 700.60 20%	Ite
C88/226	DiCarlo, J. December 8, 1988	Ball Corp.	86-4-00427	Item 640.25 6.7%	Ite
C88/227	DiCarlo, J. December 8, 1988	Traveler Trading Co.	85-9-01159	Various items at various rates	Ite
C88/228	Re, C.J. December 13, 1988	Sangamo Capacitor Div.	80-10-01680	Merchandise classified as electrical capacitors fixed or variable at 10%	Ite

tem 661.95 Various rates Item 799.00 Various rates Item 437.76 Free of duty	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT 438 (1985)	New York Columns, Separation, media or toxins or antitoxins or silica
tem 700.35 8.5% or item 700.45 at 10%	Mitsubishi Int'l Corp. v. U.S. S.O. 87-136	Baltimore Various styles of footwear
tem 700.35 8.5% or item 700.45 at 10%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136	New Orleans Various styles of footwear
tem 700.35 8.5% or item 700.45 at 10%	Mitsubishi Int'l Corp. v. U.S. S.O. 87-136	Norfolk Various styles of footwear
tem A640.25 Free of duty	Agreed statement of facts	San Diego Seamless aluminum can bodies
tem 737.95 Various rates	Agreed statement of facts	New York Halloween costumes
tem A516.94 or A656.15 Free of duty	Sangamo Capacitor Div. v. U.S., 779 F.2d 30 (1985)	Greenville-Spartanburg Silvered mica plates

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATIO
V88/65	Carman, J. November 28, 1988	C.J. Tower & Sons of Buffalo	86-2-00210	Transaction value
V88/66	Carman, J. December 5, 1988	Ayerst Laboratories, Inc.	85-2-00242-A,	Transaction value
V88/67	DiCarlo, J. December 8, 1988	Manuli U.S.A., Inc.	82-7-00940	Export value

VALUATION DECISIONS

F ON	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
e	Invoice unit value, net pkd. not including any foreign inland freight	Agreed statement of facts	Buffalo Waferboard
e	At values not involving various amounts representing proceeds of subsequent resale, disposal or use accruing to the seller or for entry No. 83-271391-8 at amount involving certain additions of such proceeds	Agreed statement of facts	Champlain Propranolol Hydrochloride
	Invoice values	Agreed statement of facts	Chicago Pressure sensitive tapes

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